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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

REPLY BRIEF OF PETITIONER

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ARGUMENT

The ultimate question of discriminatory intent in this case depends – as it did in this Court's *Miller-El* decisions[1] – upon a determination of the factors to be considered in the analysis adopted in *Batson v. Kentucky*,[2] the legal significance of those factors, the assignment of weight to each, and the inferences and conclusions to be drawn by considering them together in relation to each other. The majority and dissenting justices of the Louisiana Supreme Court were divided over these questions of law. The question before this Court is whether the justices in the majority or the dissenting justices correctly understood and applied the *Miller-El* decisions.

The State asks this Court to limit its *Miller-El* decisions to the facts of Miller-El's case, Br. 11-13, 40, 44, and to treat the issue of discrimination in this case as an issue of fact regarding the credibility of the prosecutor which the trial judge was better positioned to assess than a reviewing court. Br. 6-7. However, the principles carefully explained and applied by this Court in its *Miller-El* decisions are not so limited. This case does not present the "typical peremptory challenge inquiry" involving the very narrow question of "whether counsel's race-neutral reason for a peremptory challenge should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion).

Instead, this case presents broader issues of law, such as the State's contentions that, although the prosecutors struck five African Americans to obtain an all-white jury,

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[1] *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*); *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*).

[2] 476 U.S. 79 (1986).

for purposes of the *Batson* analysis they struck only "two out of two," Br. 39; that disparate treatment in the questioning and striking of blacks and whites by prosecutors is of no legal significance because each person is a "unique individual," Br. 43-44; that the backstrike of the first and only African American accepted by the prosecutors was a "neutral act," Br. 37; and that references to the O. J. Simpson case by the prosecutors before trial and in closing argument are not to be considered *at all* in the *Batson* analysis, Br. 36-37, 44-49.

The State also suggests that this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979), is "instructive" in applying a deferential standard of review to the decisions of the state courts. But the *Jackson* standard for reviewing the sufficiency of evidence to support a conviction[3] has nothing to do with the well-established "clearly erroneous" standard of review adopted in *Hernandez* for the direct review of *Batson* claims. *Hernandez v. New York*, 500 U.S. at 369 (plurality opinion), 372, 375 (O'Connor, J., joined by Scalia, J., concurring). The clearly erroneous standard involves an examination of the "entire record" to determine whether the reviewing court is left with a "definite and firm conviction that a mistake has been committed." *Hernandez*, 500 U.S. at 370 (plurality opinion) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Miller-El I establishes that "deference does not imply abandonment or abdication of judicial review." 537 U.S. at 340. In this case, as in *Miller-El II*, when the relevant

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[3] In *Jackson*, this Court held that the standard for reviewing the sufficiency of evidence to support a conviction was whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S. at 319.

factors are properly identified, given the appropriate weight and considered together, as was done by the dissenting justices below, their "direction is too powerful to conclude anything but discrimination." *Miller-El II*, 545 U.S. at 265.

I. THE LOUISIANA SUPREME COURT MAJORITY FAILED TO RECOGNIZE AND PROPERLY APPLY THE PRINCIPLES SET OUT IN THIS COURT'S *MILLER-EL* DECISIONS.

The State has failed to demonstrate that the prosecution was not discriminating when it used its peremptory challenges to prevent African Americans from serving as jurors. It does not address the prosecution's failure to question Elaine Scott and Jeffrey Brooks about the reasons given for striking them and fails to provide meaningful justifications for the prosecution's acceptance of whites to whom the same "reasons" applied as those asserted for striking Scott and Brooks. The State's defense of the backstrike in this case was rejected in *Miller-El II*. Finally, the State asserts for the first time a contention lacking both legal and factual support for excluding the reference to O. J. Simpson in closing argument from the *Batson* analysis.

A. The Strikes of All Five African Americans.

In defense of the Louisiana Supreme Court's "winnowing out" of three black jurors to "ease[ ]" its *Batson* analysis, JA 773-74, the State asserts that because defense counsel did not object at trial to the strikes of the first two African Americans and did not challenge the prosecution's reasons for another on direct appeal, Br. 13-20, that part of the *Batson* analysis "should be considered not as the

state excusing five out of five black prospective jurors, but as excusing two out of two." *Id.* at 39.[4] This is completely at odds with both *Miller-El* decisions, where this Court noted prominently that the State struck ten out of eleven black prospective jurors,[5] even though Miller-El challenged only seven of the ten strikes on direct appeal and six of the ten in his habeas corpus petition. *See Miller-El II*, 545 U.S. at 286 (Thomas, J., dissenting).

The prosecution's use of peremptory strikes to remove all five blacks has probative value because it was unlikely to occur by "happenstance." *Miller El II*, 545 U.S. at 232, 240 (quoting *Miller-El I*, 537 U.S. at 342). In various equal protection contexts, this Court has explained that the greater and the more unlikely the disparity, the more powerful it is as circumstantial evidence of discrimination.[6] Thus, a finding of discrimination is more likely

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[4] After arguing that the disparate impact should be considered as the State striking "two out of two," the State concedes that the strikes of all five blacks are "relevant circumstances" in the *Batson* analysis, but contends they do not support a "free-standing *Batson* claim" and should be given "little, if any weight when considering the *Batson* claims that are properly before the Court." Br. 39. At another point, it argues that the striking of all five blacks was a "neutral fact." Br. 41.

[5] This Court noted the ten of eleven black prospective jurors struck by the State in the second sentence of its decision in *Miller-El I*, 537 U.S. at 326, and in the fourth sentence of its decision in *Miller-El II*, 545 U.S. at 236, and mentioned the "91%" figure repeatedly in the two decisions. *Miller-El II*, 545 U.S. at 240, 266; *Miller-El I*, 537 U.S. at 342, 331.

[6] *See, e.g., Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (in the zoning context, when a "clear pattern" emerges, the inquiry becomes "relatively easy"). As this Court has explained, the overall impact of an action "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." *Reno v. Bossier Parish School Board*, 520 U.S. 471, 487 (1996).

where peremptory strikes produce the "grossly disproportionate exclusion of jurors of one race,"[7] and less likely where the result of strikes does not differ markedly from the racial composition of the venire or the community.[8] There is a substantial difference for purposes of the step three analysis between the prosecution using almost half its peremptory challenges (five of twelve) to prevent all five blacks in the venire from serving on the jury, as petitioner contends, and using only two of twelve to remove only some of the blacks in the venire, as the State argues. The failure of the Louisiana Supreme Court majority to consider and give appropriate weight to the actual statistical disparity was error.

B. The Failure to Question Jurors about the Reasons Asserted for Striking Them.

The State does not address the legal significance of the prosecutors' failure to question Jeffrey Brooks and Elaine Scott about the reasons they gave for striking them, but asks that "petitioner's claim that the state . . . could have asked more questions" be considered in the context of the two days of jury selection during which "a lot fewer questions" were asked than in the five weeks of voir dire in Miller-El's case. Br. 44. What matters, however, is that the prosecutors

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[7] *Ford v. State*, 423 S.E.2d 245, 247 (Ga. 1992) (following remand from this Court in *Ford v. Georgia*, 498 U.S. 411 (1991)) (finding *Batson* violation where prosecution used nine of ten strikes to remove nine of ten blacks in venire). *See also, e.g., Ex Parte Bird*, 594 So. 2d 676 (Ala. 1991); *Flowers v. State*, 947 So. 2d 910, 936 (Miss. 2007).

[8] *See, e.g., United States v. Forbes*, 816 F.2d 1006, 1009 (5th Cir. 1987) (finding no *Batson* violation where prosecution used three of six peremptories to remove blacks, resulting in a jury composed of ten whites and two blacks, a ratio "virtually identical to that on the venire").

had ample opportunity to question Brooks and Scott about the reasons they gave for striking them and engaged in such questioning of white jurors. As the State acknowledges, the lawyers were allowed "to address their questions to individual jurors . . . and to question individual jurors at length" throughout the voir dire. Br. 44 (quoting Pet. Br. 9).

The prosecutors claimed they struck Brooks because he appeared nervous and because, as a student who was missing classes, he might want to "go home quickly." JA 444. The State makes an elaborate argument to this Court that "concern over not fulfilling his graduation requirement *could have been* a cause of great anxiety for Mr. Brooks." Br. 35 (emphasis added). This assertion is based entirely on speculation about what the *law clerk* may have meant when she told the judge that Brooks needed "a three hundred clock hour observation" for his teaching requirement, Br. 33, 35-36 (quoting JA 116), and on how long the trial might last.[9] Brooks never mentioned such a requirement or any concern about graduating.

It would have been easy enough for the prosecutors to ask Brooks and find out whether he actually had any concerns about missing class once the trial judge informed him that his dean did not "see a problem" with his absence for jury service. JA 116. Brooks was one of forty-four prospective jurors out of a group of 100 who came forward after the trial judge asked the group whether the restrictions which

[9] The State argues, "there was no way to know how long the trial would last." Br. 34. However, the prosecutors repeatedly assured jurors it would last about three days. *See* JA 98, 105, 111, 119, 121, 130, 204. When one prospective juror asked to be excused because he would miss half a month of pay, prosecutor Williams responded, "A half a month's pay for missing about three days?" JA 98.

would be imposed upon jurors during trial would result in a hardship for any of them. JA 71-139.[10] (The restrictions were that the jurors would be sequestered, required to stay in a hotel, and not allowed to return to their homes or jobs until the trial was concluded. JA 71-72.[11]) The prosecutors questioned many of the jurors about their situations[12] and whether they would have difficulty

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[10] The response by so many prospective jurors – almost half of the group of 100 – undermines the rationale of the Louisiana Supreme Court majority that because Brooks came forward he was more concerned about his classes than white jurors were concerned about their spouses, children, businesses, and appointments. JA 780-81. That rationale was not even given by the prosecutors as part of their reason for striking Brooks. Two white prospective jurors who came forward in response to the question about hardship, Frances Saracione, JA 78, and Ronald Laws, JA 129-30, served as jurors.

[11] After the first group was questioned, a second group of prospective jurors was brought into the courtroom and asked the same question about whether jury service would pose a hardship. JA 153-54. Once again, a line formed. However, after the questioning of five people, prosecutor Williams announced that there were enough prospective jurors to select a jury without considering any more possible excusals for hardships. JA 161. Williams instructed the judge, "in order to totally protect the record," to put the prospective jurors waiting to be questioned under oath, have them swear they had "certifiable reasons" they could not serve, and "and then just excuse them." JA 162. The judge asked Williams whether to do it one at a time or in a group. Williams told him to do it in a group. JA 163. After the prospective jurors were placed under oath, the judge asked, "Do you all swear that you have a reason for not serving on the jury, that would create an extreme hardship for you? Do all of you swear that?" JA 164-65. After a unanimous affirmative response, the judge excused all of those remaining. JA 164. In short, Williams directed that prospective jurors swear that serving would be an "extreme hardship" regardless of whether it was true, and the judge had them do it.

[12] Questions included whether several prospective jurors would be paid if they missed work to serve as jurors, JA 87, 88, 101, 119; whether another could have work brought to him, JA 99; whether one was the sole supporter of her family, JA 81; whether one could delegate his job

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concentrating on the evidence.[13] In contrast, the prosecutors did not ask Brooks a single question when he first told the judge that he was a student and would be missing class, JA 102-04, or when the judge informed Brooks that his dean said his absence would not be a problem, JA 116. Nor did the prosecutors ask Brooks whether he had any desire to get back to observing classes when questioning him and other jurors in the first panel. JA 168-265.

It would have been equally easy for the prosecutors to ask Scott about the two reasons they gave for striking her – their speculation that she had reservations about the death penalty and their assertion, unsupported by the record, that she strongly supported a sentence of life imprisonment[14] – but they did not.

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responsibilities to someone else, JA 136; and whether one could have someone else feed his aunt's dog, JA 138.

[13] *See* JA 84 (mother of a 12-year-old asked if she would be able to "pay attention"), 88 (bar owner asked if he would be able to "listen to the evidence"), 121 (mother of a school-age child asked if she "would be unable to focus"), 126 (husband questioned regarding concerns about wife), 130 (Ronald Laws, eventual juror, asked if he could "make other arrangements" and "listen to the evidence" despite work and family obligations), 133 (wife who needed to meet her husband when his boat returned asked if she would be "worrying more about him than listening to the evidence"), 139 (mother of a 13-year-old son asked if she would be "worried about things going on outside"), 271-72 (mother asked if she would worry about her children).

[14] The State does not address the lack of support in the record for its assertion that Scott strongly favored a life sentence and asserts that "[i]t cannot be said that the prosecutor in petitioner's trial mischaracterized" any juror's answers. Br. 11. But the prosecutors mischaracterized Scott's answers, asserting that she "was very positive . . . about a life sentence, she was very positive," when in fact she expressed no such sentiments. JA 361-67, 396. *See* Pet. Br. 34-37. The State also asserts that the disparate questioning of whites and blacks was not "anywhere near the level of that in *Miller-El*," Br. 44, but the difference, as the

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Miller-El II makes it clear that the Louisiana Supreme Court erred in not recognizing the failure to question these jurors as evidence of discrimination. 545 U.S. at 246. *See also, e.g., Davidson v. Harris*, 30 F.3d 963 (8th Cir. 1994) (*Batson* violation found where party asked no questions to verify its reason); *Splunge v. Clark*, 960 F.2d 705, 708-09 (7th Cir. 1992) (finding discrimination where the prosecution did not ask about its asserted reason beyond a "cursory question"); *Norfolk S. Ry. v. Gideon*, 676 So. 2d 310, 312 (Ala. 1996) (finding *Batson* violation where counsel did not engage in any "meaningful voir dire" about reason); *State v. Slappy*, 522 So. 2d 18, 23 (Fla. 1988) ("utter failure to question two of the challenged jurors on the grounds alleged for bias ... renders the state's explanation immediately suspect").

C. The Acceptance of Similarly Situated White Jurors.

The prosecutors claimed they struck Brooks because they were concerned that he would want to "go home quickly," JA 444, but they accepted white jurors who had just as much reason to want to go home quickly due to important personal or business obligations, *see* Pet. Br. 30-33. The State summarizes the situations of prospective jurors Laws, Burns, Yeager, Sandras, and Donnes, and argues that every juror is an individual and no two are exactly the same. Br. 41-44.[15]

State acknowledges, is that the voir dire in this case lasted less than two days, Br. 44.

[15] The State does not address the prosecution's acceptance of jurors who shared the same characteristics as its reasons for striking Elaine Scott, two of whom served on the jury. *See* Pet. Br. 36-37.

However, the State does not show why any of the jurors it describes would have had any less desire than Brooks to complete their service and get back to their families and livelihoods as soon as possible. For example, while Laws said that he could "make other arrangements," as the State points out, Br. 41, there is no indication that he still did not want to get back as quickly as possible to his wife, who was recovering from surgery; his children, whom he was taking to school every day; and his contracting business so that he could complete construction of two houses that were soon to be occupied. JA 129-30. In all probability, most, if not all, of the jurors wanted to complete their service by the upcoming Labor Day weekend if possible. Yet, as described in Petitioner's principal brief at 31-33, the prosecutors accepted Laws, Burns, Yeager, Sandras, and Donnes, all of whom described obligations and concerns that would cause them to want to complete their service as quickly as possible, while asserting that they struck Brooks for that reason.[16]

Jury service inevitably causes some inconvenience or even disruption in the lives of citizens who are summoned, often with little notice, to leave what they are doing and report to the courthouse. Citizens called for jury service in a capital trial can be expected to be nervous about the awesome responsibility involved and, like most jurors everywhere, to want to return to their lives as soon as they can. The assertion of these almost universal characteristics as

[16] With the benefit of hindsight, the State argues that the defense was likely to strike two of the jurors, Burns and Donnes, as it did. Br. 41-42. But as this Court recognized in *Miller-El II*, the prosecutors could not have known with any degree of certainty how the defense would exercise its challenges. 545 U.S. at 245 n.4.

reasons for striking Brooks was a pretext for discrimination.

D. The Backstrike of Jeffrey Brooks.

Long before this Court's *Miller-El* decisions, Justices Lemmon and Johnson concluded in their dissents in 1999 that prosecutors had accepted Brooks and later used a backstrike to remove him as part of a strategy to discriminate. JA 732 (Lemmon, J., concurring) ("the timing of the Brooks backstrike made the early acceptance of Brooks suspect"); 739 (Johnson, J., dissenting) ("the prosecutor's action in accepting the first African-American seems to have been a tactic"). After this Court's remand for reconsideration in light of *Miller-El II*, Justice Kimball, in a dissent joined by Chief Justice Calogero, agreed with their assessment. JA 791 (Kimball, J., dissenting) (backstrike among circumstances that "*Miller-El* teaches are clearly relevant to the *Batson* analysis"). The majority concluded that the backstrike of Brooks was supported by the reasons asserted by the prosecutors for striking him, JA 779-80, without addressing the possibility that it was used to discriminate.

The State argues that the backstrike is "no more and no less evidence of discriminatory intent than is any other challenge" because it is "statutorily authorized" and "petitioner's counsel exercised two backstrikes." Br. 36-37. However, one of the lessons of the *Miller-El* decisions, recognized by Justice Kimball and the other dissenting justices but not by the majority, is that a statutorily authorized procedure – the jury shuffle in Miller-El's case, which both sides used – can be used by a prosecutor for

discriminatory purposes. *Miller-El II*, 545 U.S. at 253-255, 265; *Miller-El I*, 537 U.S. at 346.

In this case, the prosecutors accepted Brooks after the questioning of the first panel. JA 268. As a result, no *Batson* objection was made when they struck the next two blacks in the venire. JA 345, 400.[17] However, once the defense objected pursuant to *Batson* after the prosecutors used their sixth strike to remove Elaine Scott, JA 401-02, the prosecutors used their next peremptory to backstrike Brooks. JA 443. If the prosecutors had valid reasons for striking Brooks, they would have struck him after the questioning of the first panel. If they wanted to use their backstrikes based upon a comparison of jurors examined early in the process with those questioned later on, they would have waited until jury selection was nearing completion to exercise the backstrike, as they did in backstriking two white jurors after asking and being assured that eleven jurors had been accepted. JA 488-89.

In *Miller-El II*, this Court found that the Court of Appeals erroneously "declined to give much weight to the evidence of racially motivated jury shuffles because 'Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice.'" *Miller-El II*, 545 U.S. at 255 n.14 (quoting *Miller-El v. Dretke*, 361 F.3d 849, 855 (5th Cir. 2004)). Here, the Louisiana Supreme Court majority failed to give any weight at all to the racially motivated use of the backstrike.

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[17] The State asserts that, unlike *Miller-El II*, no trickery was involved in the questioning of jurors. Br. 12. However, it is obvious that the prosecutors tricked the defense lawyers into not making *Batson* challenges when they struck the first two black jurors.

E. References to the O. J. Simpson Case.

The Louisiana Supreme Court majority concluded that references to the O. J. Simpson case by prosecutor Williams before trial and in closing argument were irrelevant to the issue of discriminatory intent because Williams did not refer "to Simpson's or Snyder's race." JA 787. It also concluded that the reference in closing argument was invited by defense counsel.[18] The dissenting justices concluded that the references were compelling evidence of discriminatory intent. JA 732-33 (Lemmon, J., dissenting), 790 (Kimball, J., joined by Calogero, C.J., dissenting), 801 (Johnson, J., dissenting).

The State does not address the pretrial comments by prosecutor Williams that this was his "O. J. Simpson case" or defend the majority's conclusion that the references had no racial implications. Instead, it asserts a new basis for not considering the reference in closing argument as part of the *Batson* analysis – that the trial judge did not have the opportunity to consider it, Br. 48, because it was "not

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[18] The State defends this conclusion in its brief, arguing that the reference was in response to the defense argument that Snyder was under emotional and mental influences. Br. 45-47. But the State, like the Louisiana Supreme Court majority, does not explain how this allowed the prosecutor to go outside the record and compare Snyder's case to the most racially polarizing case in the country as a reason to give Snyder the death penalty. Louisiana law limits argument by attorneys to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." La. C. Crim. Proc. Art. 774 (1998). The State argues that the Simpson case was "historical fact of which the jury would have been aware" and could consider, Br. 45-46, but that it was not something the Louisiana Supreme Court could consider, because it was not part of the record, Br. 47. However, the Louisiana Supreme Court would surely have had the same awareness as the jury.

in existence at the time the *Batson* objections were made and ruled upon," Br. 45.[19]

However, neither the trial court nor the Louisiana Supreme Court majority refused to consider the reference to the O. J. Simpson case in closing argument based on when it was made. Such a ruling would have been indefensible on both the law and the facts. The Louisiana Supreme Court has properly recognized that "comments . . . made in closing argument" may be "relevant under *Miller-El* to prove a party's racial motive in making an earlier peremptory challenge." *Alex v. Rayne Concrete Service*, 951 So. 2d 138, 146 (La. 2007). And the trial court was presented with the argument that Williams "maneuvered the jury around to where it was all white," so that he could make the O. J. Simpson argument, JA 659, before it finally ruled on the *Batson* claim in denying Snyder's motion for a new trial, JA 664-65.

Indeed, the trial court's only opportunity to consider the totality of the circumstances relevant to the *Batson* claim was on the motion for a new trial because it overruled each *Batson* challenge as the jury was being selected and before all the facts had been developed.[20] *See Coulter v.*

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[19] The State also argues that consideration of the reference will encourage defendants to "bolster their appellate arguments on *Batson* issues by pointing to prosecutors' comments made long after the jury selection has been completed." Br. 48-49. Of course, the best way to prevent that would be for prosecutors to refrain from appealing to race at any time.

[20] When the trial judge upheld the strike of Elaine Scott after the questioning of the third panel, JA 401-02, the prosecution had used only three of six strikes to remove blacks and had accepted one black, Jeffrey Brooks. At that time, and at the time the trial judge upheld the backstrike of Brooks after questioning of the fourth panel, JA 443-46,

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Gilmore, 155 F.3d 912, 921 (7th Cir. 1998) (finding *Batson* error where the trial judge failed to consider the totality of the circumstances but instead conducted only a "juror-by-juror inquiry"). However, it appears that the trial court did not take advantage of that opportunity because in denying the motion it said only, "the Court believes that the D.A. explained sufficient race neutral reasons for his challenges." JA 665.

Thus, there was no procedural, legal, or factual reason to exclude the references to O. J. Simpson from "'the totality of the relevant facts'" in determining the prosecution's intent in striking black prospective jurors. *Miller-El II*, 545 U.S. at 239 (quoting *Batson*, 476 U.S. at 94). The Louisiana Supreme Court majority erred by not recognizing and considering the racial implications of the references.

II. THE FINDINGS OF THE LOUISIANA COURT ARE SUBJECT TO CLEAR ERROR REVIEW.

The State confuses the clearly erroneous standard of review, which this Court and lower appellate courts have consistently applied in review of *Batson* claims, with the sufficiency-of-the-evidence standard adopted in *Jackson v. Virginia*, 443 U.S. 307 (1979), and suggests that this

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neither the trial court nor counsel knew that the prosecution would later strike a fifth black, Loretta Walker, JA 447-48; that the prosecution's questioning of white jurors in the fifth and sixth panels would continue to differ from its questioning of Scott and Brooks; and that the prosecution would later accept jurors Yeager, JA 489, Sandras, JA 490, and Laws, JA 549, even though they had as much reason to want to "go home quickly" due to family and work obligations as Brooks might have had due to being a student.

Court's only role in reviewing a *Batson* claim rejected by a state court is "to ask whether any rational trier of fact could have accepted as race-neutral the prosecutor's reasons." Br. 10.

However, as this Court has made clear on numerous occasions, "[a] finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added) (cited in *Hernandez*, 500 U.S. at 369 (plurality opinion)). *See also Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (cited in *Batson v. Kentucky*, 476 U.S. at 98); Fed. R. Civ. Pro. 52(a). This Court reaffirmed this standard of review in *Miller-El I*, 537 U.S. at 339-40, and *Rice v. Collins*, 546 U.S. 333, 338 (2006). Federal and state appellate courts regularly apply it in the direct review of *Batson* claims,[21] as the Louisiana Supreme Court majority said it was doing in this case. JA 787-88.

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[21] *See, e.g.*, *United States v. Nelson*, 450 F.3d 1201, 1207, (10th Cir. 2006), *cert. denied*, 127 S. Ct. 326 (2006); *United States v. Hill*, 146 F.3d 337, 341 (6th Cir. 1998); *Davidson v. Harris*, 30 F.3d 963, 966 (8th Cir. 1994); *United States v. Bentley-Smith*, 2 F.3d 1368, 1372-73 (5th Cir. 1993); *Williams v. Chrans*, 957 F.2d 487, 490 (7th Cir. 1992); *United States v. Lewis*, 837 F.2d 415, 417 (9th Cir. 1988); *Gamble v. State*, 357 S.E.2d 792, 794 (Ga. 1987); *People v. Hope*, 589 N.E.2d 503, 506 (Ill. 1992); *Kent v. State*, 675 N.E.2d 332, 340 (Ind. 1996); *Caudill v. Commonwealth*, 120 S.W.3d 635, 657 (Ky. 2003); *State v. McRae*, 494 N.W.2d 252, 254 (Minn. 1992); *Chisolm v. State*, 529 So. 2d 630, 633 (Miss. 1988); *State v. Antwine*, 743 S.W.2d 51, 66 (Mo. 1987); *Libby v. State*, 975 P.2d 833, 839 (Nev. 1999); *State v. Thomas*, 407 S.E.2d 141, 148 (N.C. 1991); *State v. Frazier*, 873 N.E.2d 1263, 1279 (Ohio 2007); *State v. Haigler*, 515 S.E.2d 88, 91 (S.C. 1999); *Whitsey v. State*, 796 S.W.2d 707, 721-26 (Tex. Crim. App. 1989); *State v. Lamon*, 664 N.W.2d 607, 611 (Wis. 2003); *Beartusk v. State*, 6 P.3d 138, 143 (Wyo. 2000).

As the plurality in *Hernandez* observed, 500 U.S. at 367-68, the clearly erroneous standard is consistent with the review this Court has long applied in jury discrimination cases such as *Norris v. Alabama*, 294 U.S. 587, 590 (1935), where this Court "analyze[d] the facts in order that the appropriate enforcement of the federal right may be assured," and *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939), where this Court explained that "when a claim is properly asserted . . . that a citizen whose life is at stake has been denied equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts."

The plurality in *Hernandez* also pointed out that the clearly erroneous standard is applied in other equal protection cases such as *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (affirming holding of Court of Appeals that district court's conclusion that state constitutional provision was not adopted with an intent to discriminate was clearly erroneous); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (examining record and applying clearly erroneous standard to district court's finding that at-large voting system was maintained for discriminatory purposes); and *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534, 542 (1979) (affirming holding of Court of Appeals that district court's failure to find the intentional operation of a dual school system was clearly erroneous). *Hernandez*, 500 U.S. at 364-65.[22]

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[22] *See also Miller v. Johnson*, 515 U.S. 900, 915 (1995) (concluding that the district court's findings that race was the predominant factor motivating the drawing of a congressional district were not clearly erroneous and examining the record thoroughly "to consider the

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In other contexts as well, this Court has "analyze[d] the facts in order that the appropriate enforcement of the federal right may be assured." *Drope v. Missouri*, 420 U.S. 162, 175 (1975) (citing *Norris*, 294 U.S. at 590). There, this Court unanimously reversed a conviction because the state courts failed "to consider and give proper weight to the record evidence" in determining that Drope was competent for trial. *Id.* at 179.

The ultimate determination of discriminatory intent on this record depends, as in the *Miller-El* cases, upon conclusions to be drawn by collating "facts" that lie in several quite different dimensions. These include the percentages of black and white venirepersons peremptorily struck by the prosecution; the characteristics, other than race, of blacks the prosecution struck and of whites the prosecution did not challenge; the ways in which the prosecution questioned black and white venirepersons; the reasons given by the prosecution for its strikes of blacks, and the extent to which the record supports those reasons; the prosecution's protestations that the strikes were not racially motivated; the prosecution's use of tactical devices such as the backstrike, which can serve a discriminatory function; the prosecution's persistent effort – from pretrial through closing argument – to portray Snyder's case as a local "O. J. Simpson case"; and the differential impact the prosecution's argument that Snyder should not be allowed to "[get] away with it" as Simpson did would have on black and white jurors in the cultural and historical context of Jefferson Parish.

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requirements of the proof necessary to sustain this equal protection challenge").

This is far different from *Hernandez v. New York*, where this Court addressed the "typical peremptory challenge inquiry" in which "the decisive question" is "whether counsel's race-neutral reason for a peremptory challenge should be believed." 500 U.S. at 365 (plurality opinion); *see also id.* at 372 (O'Connor, J., concurring) ("Upon resolution of the factfinding questions, this case is straightforward.").

In this Court's first *Miller-El* decision, it modeled the process for evaluating *Batson* claims on a complex factual record under the Antiterrorism and Effective Death Penalty Act. After "explain[ing] in some detail the extensive evidence concerning the jury selection procedures" in the case, 537 U.S. at 331, the Court held that the Fifth Circuit should have issued a certificate of appealability because the District Court "did not give full consideration to the substantial evidence . . . [that Miller-El] put forth in support of . . . [his] *prima facie* case . . . [but i]nstead . . . accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in . . . [Miller-El's] trial." *Id.* at 341. On remand, the Fifth Circuit granted a COA but rejected Miller-El's *Batson* claim on the merits in an opinion that fell short of conducting the kind of analysis which this Court had modeled for it in broad strokes. This Court again granted review, analyzed the evidence in careful detail, demonstrated exactly why it was "too powerful to conclude anything but discrimination," *Miller-El II*, 545 U.S. at 265, and granted Miller-El *Batson* relief.

Following this second *Miller El* decision, this Court vacated the Louisiana Supreme Court's judgment in Snyder's case and remanded for reconsideration in light of *Miller-El II*. Like the Fifth Circuit, the Louisiana Supreme

Court majority did not correctly follow this Court's guidance in applying *Batson*'s doctrinal analysis to Snyder's claim. Thus, this Court is called upon again to demonstrate the proper application of constitutional law to the evidence presented here.

CONCLUSION

For the foregoing reasons, in addition to those set forth in Petitioner's principal brief, this Court should reverse the decision of the Louisiana Supreme Court and remand this case with directions that it grant Snyder relief pursuant to *Batson v. Kentucky*.

Respectfully submitted,

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